

1987

# Utah v. David Andrew Moosman : Brief of Appellant

Utah Supreme Court

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BRIEF

**870251**

IN THE SUPREME COURT OF THE STATE OF UTAH

THE STATE OF UTAH,

\*

Plaintiff-Respondent,

\*

Case No. 870251

v.

\*

Argument Priority  
Classification 1

DAVID ANDREW MOOSMAN,

\*

Defendant-Appellant.

\*

**BRIEF OF APPELLANT**

Appeal from convictions of Murder in the First Degree, a Capital Felony, Communications Fraud, a First Degree Felony, and False or Fraudulent Insurance Claim, a Second Degree Felony, in the First Judicial District Court of Cache County, Utah, the Honorable VeNoy Christofersen presiding.

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Clerk, Sup.

Utah

IN THE SUPREME COURT OF THE STATE OF UTAH

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THE STATE OF UTAH,	*	
Plaintiff-Respondent,	*	Case No. 870251
v.	*	Argument Priority
		Classification 1
DAVID ANDREW MOOSMAN,	*	
Defendant-Appellant.	*	

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Appeal from convictions of Murder in the First Degree, a Capital Felony, Communications Fraud, a First Degree Felony, and False or Fraudulent Insurance Claim, a Second Degree Felony, in the First Judicial District Court of Cache County, Utah, the Honorable VeNoy Christoffersen presiding.

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THE STATE OF UTAH,	*	
Plaintiff-Respondent,	*	Case No. 870251
v.	*	Argument Priority
		Classification 1
DAVID ANDREW MOOSMAN,	*	
Defendant-Appellant.	*	

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**STATEMENT OF ISSUES PRESENTED ON APPEAL**

This is an appeal from verdicts of guilty in the First Judicial District Court for Cache County, State of Utah, the Honorable VeNoy Christoffersen sitting without a jury, to the crimes of Murder in the First Degree, a Capital Felony, in violation of Section 76-5-202(1)(f), Utah Code Annotated 1953, as amended, of Communications Fraud, a First Degree Felony, in violation of Section 76-10-1801(1)(e), Utah Code Annotated 1953, as amended, and of False or Fraudulent Insurance Claim, a Second Degree Felony, in violation of Section 76-6-541 and Section 76-6-412(1)(a)(i), Utah Code Annotated 1953, as amended.

The Appellant contends that the trial court erred in proceeding to try the Defendant without a jury when there had been no waiver of the jury. The case had originally been scheduled for trial with a jury. (R. pg 61) However, subsequent

to the matter having been scheduled for jury trial, for reasons which do not appear in the record, the jury was vacated and the trial proceeded without a jury. Both the record and the transcript of the proceedings are silent as to any waiver of a jury trial, and the Appellant contends that the trial should not have proceeded as a judge only trial absent the showing of a knowing and informed waiver by the Defendant of his right to be tried by a jury. The Appellant further contends that the trial court erred in finding the Defendant guilty because there was insufficient evidence presented by the State to support a verdict of guilty as to any of the counts alleged in the Information. Finally, the Appellant contends that the trial court erred in allowing testimony to be given of the autopsy examination of Defendant's wife by a medical pathologist who was not present at the autopsy.

#### **STATEMENT OF FACTS**

On Saturday evening, September 14, 1985, Tamara A. Moosman, the wife of the appellant, was killed in a single car accident in Logan Canyon, Cache County, Utah. The decedent and the appellant had traveled from Logan to Garden City for a dinner engagement and were returning to Logan at the time of the accident.

At an area of Logan Canyon known as the government dugway, the appellant lost control of the 1977 Datsun pickup truck he was driving. The appellant was thrown from the truck at some point before the truck came to rest in the Logan River down a steep embankment from the roadway. The appellant has no memory of how the accident occurred. However, following the accident he made



his way down the embankment and offered assistance to his wire by pulling her from the wreckage. He placed her on the ground beside the river and then he climbed back to the roadway in an effort to stop a passing motorist for assistance.

Mrs. Moosman was still alive when the appellant pulled her from the wreckage and when she was placed on the river bank. However, by the time help was summoned and arrived at the accident site, Mrs. Moosman had moved from the river bank and her lifeless body was subsequently found in the Logan River. There were no eyewitnesses to the death of Mrs. Moosman or to the accident itself.

#### **SUMMARY OF ARGUMENT**

The appellant argues that Section 77-35-17(c) of the Utah Code requires that felony matters be tried by jury absent an informed, intelligent and voluntary waiver by the defendant. The informed, intelligent and voluntary waiver of the defendant's right to a jury trial cannot be presumed where the record is silent as to (a) the existence of any waiver at all or (b) the circumstances surrounding any alleged waiver. Furthermore, the appellant argues that the evidence as heard by the trial judge was insufficient to support a conviction as to any of the three separate counts alleged in the information, those being murder in the first degree, communications fraud and filing a false or fraudulent insurance claim. Finally, the appellant contends that the trial court abridged the defendant's right to confront witnesses when the court permitted the state's medical examiner who had not conducted the autopsy examination of the decedent to testify as to his findings and opinion concerning the autopsy.

## ARGUMENT

### POINT I

THE TRIAL COURT'S FAILURE TO PROVIDE A JURY TRIAL TO A DEFENDANT CHARGED WITH MURDER IN THE FIRST DEGREE, A CAPITAL FELONY, COMMUNICATIONS FRAUD, A FIRST DEGREE FELONY, AND FALSE OR FRAUDULENT INSURANCE CLAIM, A SECOND DEGREE FELONY, IS REVERSIBLE ERROR WHERE THE RECORD IS SILENT AS TO A WAIVER OF THE JURY TRIAL BY THE DEFENDANT AND ABSENT A SHOWING THAT THE WAIVER, IF ANY, WAS KNOWINGLY, INTELLIGENTLY AND VOLUNTARILY ENTERED.

Section 77-35-17(c), Utah Code Annotated 1953, as amended, provides that a Defendant charged with a felony is entitled to a jury trial. The section provides:

(c) All felony cases shall be tried by jury unless the defendant waives a jury in open court with the approval of the court and with the consent of the prosecution.

The matter was originally scheduled for a jury trial. (R.61) However, the trial proceeded without a jury and a careful examination of the record does not disclose a waiver, much less a knowing, intelligent and voluntary waiver by the Defendant of his statutory and constitutional right to a jury trial. Absent such a showing, the Defendant submits that no assumption can be made as to a waiver or the voluntariness of such a waiver.

In State v. Cook, 714 P.2d 296 (Utah 1986) this Court, in a per curiam decision, reversed Cook's conviction of Criminal Mischief, a Class "A" Misdemeanor, holding that the trial court's failure to provide a jury trial for a defendant charged with a felony offense is reversible error absent a showing that the

defendant had waived his statutory right to jury trial in open court or on the record.

In the Cook case the defendant had been charged with a felony offense and the case was originally set for a jury trial at the time of arraignment. Sometime following arraignment, but prior to trial, at a time when the defendant was not present, the prosecutor requested and was given a non-jury trial setting after defendant's attorney was permitted to withdraw as defense counsel. This Court found nothing in the record in the Cook case to indicate that the defendant had waived his statutory right to a jury trial, and in fact, this Court stated that the "unexplained vacation of the trial setting is unjustifiable in view of the statute's expressed language". The Court further stated that where no waiver of a jury was ever made by the defendant in open court or on the record, no such waiver will be presumed from a silent record. (Supra at 297)

This Court has set guidelines with respect to the requirement that the record disclose not only a waiver of a defendant's right to jury trial, but also that the waiver be voluntary and intelligent. For example, see State v. Garteiz, 688 P.2d 487 (Utah 1984), which examined the waiver of a jury trial by a defendant who had been convicted in the Fourth District Court for Millard County. In Garteiz the trial judge, at the beginning of the trial and in the presence of defense counsel, emphasized, on the record, that defendant was waiving his right to a jury and further inquiry was made with regards to the fact that the defendant had "an absolute right" to have the matter tried by a jury. A further inquiry was made as to whether

or not the Defendant was asking the court to allow him to waive his right to a jury. The trial judge also informed the defendant that the court could refuse to allow him to waive the right to a jury and that the prosecutor must also agree to the waiver. In each instance Garteiz acknowledged that he understood his rights with respect to a jury and the prosecuting attorney on the record waived the right to a jury trial before the trial court accepted the waiver. (Supra at pg 488). In a concurring opinion Justice Durham suggested that additional procedural safeguards might be implemented to assure that a criminal defendant understand the jury function and that the defendant's right to a jury trial can in no way be abrogated without his full, informed consent. Justice Durham suggests that a defendant's right to a jury trial is meaningless unless inquiry is made into the defendant's understanding of his waiver and a careful explanation is made of the waiver of the right to a jury trial before the trial court accepts the defendant's waiver. (Supra at pg 489).

In the Cook decision this Court cited Article I, Section 12 of the Utah State Constitution and the United States Supreme Court case of Duncan v. Louisiana, 391 U.S. 145, 20 L. Ed. 2d 491, 88 S. Ct. 1444 (1968) as holding that "a criminal defendant's right to a jury trial is substantial and valuable and should be carefully safeguarded by our courts". (Cook, supra at pg 297). See also McCarthy v. United States, 395 U.S. 459, 22 L. Ed. 2d. 418, 89 S. Ct. 1166 (1969), which held that the defendant must understand the nature of his constitutional rights for there

to be a valid waiver of those rights. Such a holding is fundamental to due process.

In the instant case, as in Cook, the record of the proceedings in the trial court is silent as to the reason for vacating the jury trial setting. There is no indication that Mr. Moosman understood the implications of a waiver of his right to a trial by jury, or even that he waived his right to have the matter tried by a jury of his peers. Following the rationale of this Court in both the Cook and the Garteiz decisions, the instant case should be reversed and the case remanded for a new trial with a jury.

## POINT II

### THE EVIDENCE DOES NOT SUPPORT A FINDING OF FIRST DEGREE MURDER AND A FORTIORI DOES NOT SUPPORT FINDINGS OF GUILTY TO COMMUNICATIONS FRAUD AND FALSE OR FRAUDULENT INSURANCE CLAIM.

This court, in State vs. Walker, 743 P.2d 191 (Utah 1987), enunciated the rule that verdicts from bench trials in criminal cases are subject to review under the "clearly erroneous" standard specified in Rule 52(a) of the Utah Rules of Civil Procedure, and in so doing, rejected State vs. Isaacson, 704 P.2d 555, 557 (Utah 1985) which had held that in both bench and jury trials the court would overturn a conviction only when "the evidence is so lacking and insubstantial that a reasonable person could not have reached that verdict beyond a reasonable doubt". Isaacson, 704 P.2d at 557.

In State vs. Wright, 744 P.2d 315 (Utah App. 1987), the Court of Appeals cited the Walker case as interpreting the "clearly erroneous" standard to require:

that if the findings (or the trial court's verdict in a criminal case) are against the clear weight of the evidence, or if the appellate court otherwise reaches a definite and firm conviction that a mistake has been made, the findings (or verdict) will be set aside.

(Walker, 743 P.2d at 193; Wright, 744 P.2d at 317).

This court in the Walker case further states that ". . . the appellate court may examine all of the evidence in the record" and that it must "reject [the trial court's] findings if it considers them to be clearly erroneous." Walker, 743 P.2d at 193.

Careful scrutiny of the record in the instant case discloses a number of erroneous findings by the trial court which are not supported by the evidence introduced at trial. For example, the trial court's finding at page 1647 of the record that the abrupt turning of the car by the appellant constituted an "intentional part on the part of the driver of running the car off the road with the passenger in it with an escape route for himself" at a point which the trial judge described as " . . . one of the most dangerous parts in Logan Canyon, at a point conveniently just past the guardrail, at a point where an exit could be made if you do it quickly enough just as the car turns, in which you might let go of the steering wheel just as it existed (sic) off the shoulder of the road . . ." (Tr. pg 1647) is totally unsupported by the evidence. No testimony was ever presented by either the prosecution or the defense that this area of the Logan Canyon is one of the most dangerous parts in the canyon. Neither was there

testimony that the fall down the embankment was at a point conveniently past the guardrail.

The facts are that the accident occurred during hours of darkness on a roadway which was not illuminated except by the headlights of the appellant's truck. Based upon testimony of the expert witnesses the truck was traveling roughly 37 miles per hour when control was lost. Nevertheless, the trial court found the speed to be slower than the speed initially found by the experts, that is a speed of between 27 and 22 miles per hour which the court believed to be significant. (Tr. pg 1646) Irrespective of the speed of the speed of the Moosman vehicle, either 37 miles per hour or between 27 and 22 miles per hour, it was the opinion of the expert witnesses that the appellant would have left the vehicle at the same rate of speed as the vehicle from which he left. The appellant submits that based upon the evidence presented at trial there is no basis for the court to have found that the appellant calculated his exit from the vehicle to coincide with his being at a location "conveniently beyond the guardrail" where the appellant could jump at the least risk to himself. (Tr. pp 1647, 1650-510)

Such a finding is a strained interpretation of the evidence. The expert witnesses produced by both the prosecution and the defense agreed that the defendant's reaction time and the physics of the accident would have prevented the appellant from opening the truck door and jumping out before the truck left the pavement. Furthermore, the darkness of the canyon and the speed of the vehicle when control was lost mitigate against a finding that the appellant jumped clear of the out of control truck into

an area predetermined by the appellant to have provided himself a safe escape.

The trial court places great weight upon the testimony of the state medical examiner in concluding that Mrs. Moosman's wounds were caused by having been struck by a blunt instrument and not by the accident itself or the action of a body rolling over in the stream on the rocks. (Tr. 1648-1650) The appellant submits, however, that Dr. Sweeney did not have sufficient contact with the Mrs. Moosman during the autopsy examination to have formed an opinion as to cause of death. This issue is more fully addressed as Point III of appellant's brief. Suffice it to say at this point that the trial court erred in allowing Dr. Sweeney's testimony for the reasons set for in Point III herein, and that the trial court's having allowed the testimony over defendant's objection and placing such weight on the testimony is a further example of the court's clear error in the interpretation of the evidence presented at trial.

### POINT III

THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHT TO CONFRONT THE ASSISTANT MEDICAL EXAMINER WHO CONDUCTED THE AUTOPSY EXAMINATION OF DEFENDANT'S WIFE, AND IN SO DOING THE TRIAL COURT ERRED IN ALLOWING HEARSAY TESTIMONY TO BE ADMITTED AS TO THE AUTOPSY. BY THE TRIAL COURT'S NOT HAVING REQUIRED THE ASSISTANT MEDICAL EXAMINER WHO CONDUCTED THE AUTOPSY TO HAVE TESTIFIED BEFORE PERMITTING THE STATE MEDICAL EXAMINER TO TESTIFY AS TO HIS FINDINGS AND PROFESSIONAL OPINION CONCERNING THE AUTOPSY EXAMINATION.

The Sixth Amendment of the United States Constitution provides in part that a criminal defendant shall have the right "to be confronted with the witnesses against him". U.S. Const.



Amend. VI. A criminal defendant enjoys similar rights guaranteed by the Constitution of the State of Utah. Utah Const. Art. I, Section 12. The right of confrontation has been statutorily defined as well. See Section 77-1-6(1)(d), Utah Code Annotated 1953, as amended.

In Reardon v. Manson, 491 F. Supp. 982 (1980), the United States District Court for the District of Connecticut, on a Writ of Habeas Corpus from a state court conviction, under circumstances similar to the instant case, held that a toxicologist's testimony in which he relied upon the analysis of others with no firsthand knowledge of test results was hearsay, the receipt of which by the court operated as a denial of the defendant's Sixth Amendment right to confront his accusers. In Reardon the defendant had been convicted of a drug offense. The trial court had allowed one of three state toxicologists to testify as to the testing of substances which were found to be controlled substances. On direct and cross examination the toxicologist conceded that his testimony had been based entirely on his observations of the results of tests which were conducted out of his immediate presence by laboratory chemists under his supervision and on oral or handwritten reports from these chemists.

The Connecticut court held that the testimony of the state toxicologist was inadmissible hearsay, stating that "it is beyond dispute that the chemist's extra-judicial testimony constituted a central link in the prosecution of these petitioners". (Reardon

supra at pg 985). The court established three criteria against which confrontation clause questions should be tested:

First: is the hearsay testimony "crucial" to the prosecution's case or does it have a "devastating" effect on the defense? Second: if so, has the prosecution carried its burden of establishing that the extra-judicial declarant is in fact not available? Finally: does the testimony bear other "indicia of reliability"?

Following Pointer v. Texas, 380 U.S. 400, 13 L. Ed. 2d 923, 85 S. Ct. 1065 (1965), the Sixth Amendment right of confrontation has repeatedly been referred to as an "essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." Reardon supra at 985; Pointer supra, 380 U.S. at 405; Barber v. Paige, 390 U.S. 719, 20 L. Ed. 2d 255, 88 S. Ct. 1318 (1968).

The Reardon court cited language from United States v. Oates, 560 F.2d 45, 80 n.34 (2d Cir. 1977) stating:

It is clear that in the context of the confrontation clause the "witness against" the accused is the extra-judicial declarant, and not the live witness who merely narrates the hearsay at trial.

In the instant case Dr. Edward S. Sweeney, the medical examiner for the State of Utah, testified from records and notes compiled by an individual identified as Dr. Salazar. (Tr. pp 996-1034, 1108, 1542-1570). Dr. Salazar was identified as being a forensic pathology fellow as well as a medical examiner assistant, more a clerk at the time of the autopsy. (Tr. pg 998). Dr. Sweeney testified that he was in and out during the autopsy, but that Dr. Salazar had the primary responsibility for performing the autopsy and, in fact, Dr. Salazar was the person

who performed the autopsy of Mrs. Moosman. (Tr. pg 999). Dr. Sweeney further testified that he made no notes as to any observations he may have had from the autopsy and that any notes that were made and relied upon by him for the basis of the autopsy report were made by Dr. Salazar. (Tr. pp 999 and 1000). Dr. Salazar wrote the report. (Tr. pg 1001). No explanation was offered by the prosecuting attorney as to why Dr. Salazar was not called to testify. This is not a case where the prosecution did not try hard enough to produce an underlying witness. Here it appears that the prosecution simply did not try at all.

Trial counsel specifically objected to the hearsay testimony of Dr. Sweeney and reliance upon the extra-judicial declarations of Dr. Salazar as being violative of the Defendant's Sixth Amendment right of confrontation of a critical witness. (Tr. pp 1002 and 1003). Trial counsel's objection was overruled and Dr. Sweeney was permitted to testify. (Tr. pg 1003).

Applying the criteria enunciated in Reardon to the instant case, the Defendant was denied his right to confront a witness crucial to the state's case. The testimony of the medical examiner introduced the cause of death and theorized as to the defendant's criminal involvement in his wife's death. The testimony was crucial to the state's case.

No efforts were made to produce Dr. Salazar who had conducted the examination and prepared the report. By not producing the actual examiner, arguably the prosecution shielded a less experienced witness from the rigors of cross examination.

Finally, the Defendant submits that the testimony of Dr. Sweeney lacks the "indicia of reliability" suggested by the

Reardon decision. Reardon suggests that "where an extra-judicial statement is crucial to a prosecutor's case and where the prosecutor fails to establish that he made a good faith effort to produce the out of court declarant the admission of the statement constitutes a per se violation of the defendant's sixth amendment right without any need to examine other indicia of reliability." Reardon, supra, at 987. In the instant case, however, there is ample reason to determine that the testimony of Dr. Sweeney is unreliable.

Yet it is clear from the record that Dr. Sweeney conducted no part of the examination. He was involved only peripherally. The autopsy examination was conducted by a medical examiner trainee over approximately a two and one-half hour period. Dr. Sweeney was not present when any of the photographs were taken. He made no notes, wrote no portion of the report and prepared no memorandum regarding the autopsy examination or the cause of Mrs. Moosman's death. Dr. Sweeney was not present when the scalp was reflected, nor when the injuries were examined. The photographs were not taken until after the scalp had been reflected. No photographs were taken prior to the commencement of the examination. Nevertheless, Dr. Sweeney was permitted to testify from the report of another on an element as crucial as the cause of death.

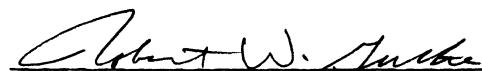
### CONCLUSION

Section 77-35-17(c) of the Utah Code is specific as to the requirements for a waiver of a jury trial in felony matters. Nevertheless, a careful examination of the record fails to

disclose that the appellant waived his right to a jury trial either in open court or through any other means. This court cannot presume that the defendant waived his statutory and constitutional right to a jury trial absent disclosure in the record that the defendant's waiver, if any, was knowingly, intelligently and voluntarily entered and accepted by the court.

In the absence of a jury, the trial court proceeded to hear evidence and found the appellant guilty of each of the counts alleged in the information. However, the appellant submits that the evidence upon which the trial court based its finding of guilt was insufficient to support the conviction on any of the three counts. The appellant contends that constitutionally impaneled jury would have viewed the evidence differently than the trial court sitting without a jury.

RESPECTFULLY SUBMITTED this 6 day of January, 1989.

  
Robert W. Gutke  
Attorney for Defendant/Appellant

#### MAILING CERTIFICATE

I hereby certify that I mailed four (4) true and correct copies of the above and foregoing Brief to counsel for the Plaintiff/Respondent, Paul Van Dam, Attorney General's Office, 236 State Capitol Building, Salt Lake City, Utah 84114, postage prepaid, this 6 day of January, 1989.

